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GOOGLE LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOHN DOE I, et al., individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

GOOGLE LLC,

Defendant.

Case No. 3:23-cv-02431-VC
(Consol. w/ 3:32-cv-02343-VC)

**DEFENDANT GOOGLE LLC'S REQUEST
FOR JUDICIAL NOTICE IN SUPPORT OF
MOTION TO DISMISS FIRST AMENDED
COMPLAINT**

Date: February 22, 2024

Time: 10 a.m.

Location: Courtroom 4, San Francisco

Judge: Hon. Vince Chhabria

First Am. Complaint Filed: November 16, 2023

Consol. Complaint Filed: July 13, 2023

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Defendant Google LLC (“Google”) hereby respectfully requests, pursuant to Federal Rule of Evidence 201 and applicable case law, that the Court consider Exhibits 1–21 under the doctrines of judicial notice and/or incorporation by reference, as appropriate, in support of Google’s concurrently filed Motion to Dismiss Plaintiffs’ First Amended Consolidated Class Action Complaint (“FAC” or “Amended Complaint”).

1. **Exhibit 1:** *Google Analytics Terms of Service*, Google Marketing Platform, available at <https://marketingplatform.google.com/about/analytics/terms/us/>
2. **Exhibit 2:** *HIPAA and Google Analytics*, Analytics Help, available at <https://support.google.com/analytics/answer/13297105?hl=en>
3. **Exhibit 3:** *Google Privacy Policy*, available at <https://policies.google.com/privacy?hl=en>
4. **Exhibit 4:** *Data Sharing Settings*, Analytics Help, available at <https://support.google.com/analytics/answer/1011397?hl=en#zippy=%2Cin-this-article>
5. **Exhibit 5:** *Terms of Service*, Google, available at <https://policies.google.com/terms?hl=en-US>
6. **Exhibit 6:** *Gundersen Health System Privacy Policy*, available at <https://www.gundersenhealth.org/privacy>
7. **Exhibit 7:** *Notice of Online Privacy Policy for Medstar Health*, available at <https://www.medstarhealth.org/online-privacy-policy>
8. **Exhibit 8:** *MD Mercy Website Terms of Use*, available at <https://mdmercy.com/about-mercy/policies-and-documents/website-terms-of-use>
9. **Exhibit 9:** *Kaiser Permanente Website and mobile application Privacy Statement*, available at <https://healthy.kaiserpermanente.org/northern-california/privacy>
10. **Exhibit 10:** *BJC HealthCare Privacy*, available at <https://www.bjc.org/privacy>

11. **Exhibit 11:** *OSF Healthcare Website Privacy Policy*, available at <https://www.osfhealthcare.org/legal/privacy/>
12. **Exhibit 12:** *OSF Healthcare Terms & Conditions*, available at <https://x.osfhealthcare.org/patients-visitors/terms-conditions>
13. **Exhibit 13:** *United Healthcare Online Services Privacy Policy*, available at <https://www.uhc.com/privacy>
14. **Exhibit 14:** *United Healthcare Terms of Use*, available at <https://www.uhc.com/privacy/terms-of-use>
15. **Exhibit 15:** *Mercy Website Terms & Privacy*, available at <https://www.mercy.net/about/legal-notices/>
16. **Exhibit 16:** *Planned Parenthood Privacy Policy*, available at https://www.plannedparenthood.org/privacy-policy?gclid=CjwKCAjw_aemBhBLEiwAT98FMkXezn2s4mLUb2j9xppH61enamiPKTB6oOL3lTp6NNlptkplKEOQVxoCq2oQAvD_BwE
17. **Exhibit 17:** *Rush University Medical Center, Web Privacy Statement*, available at <https://www.rush.edu/web-privacy-statement>
18. **Exhibit 18:** *Tallahassee Memorial HealthCare Privacy Policy*, available at <https://www.tmh.org/privacy-policy/>
19. **Exhibit 19:** *Shannon Health, Notice of Privacy Practices*, available at <https://www.shannonhealth.com/notice-of-privacy-practices/>
20. **Exhibit 20:** *Alton Memorial Hospital, Our Policies*, available at <https://www.altonmemorialhospital.org/Our-Policies>
21. **Exhibit 21:** *Edward Elmhurst Health, Website Privacy Practices*, available at <https://www.eehealth.org/privacy-practices/>

MEMORANDUM OF POINTS AND AUTHORITIES

Google respectfully requests that the Court consider Exhibits 1–21, as set forth in the Declaration of Naiara Toker submitted herewith, in support of Google’s concurrently filed Motion to Dismiss.

Exhibits 1–5 are Google’s publicly available privacy policies, terms of service, and user notices, several of which (as specified below) also are referenced or relied upon in Plaintiffs’ Amended Complaint. Exhibits 6–21 are publicly available privacy policies, cookie policies, terms of service, and homepages of third-party healthcare-related websites referenced in Plaintiffs’ Amended Complaint.

Exhibits 1–21 are publicly available documents not subject to reasonable dispute. *See* Fed. R. Evid. 201(b). As such, they may be considered by the Court in conjunction with Google’s Motion to Dismiss. Further, the Court also may consider Exhibits 1-3 and 5 for the additional reason that Plaintiffs’ Amended Complaint references or relies on these documents, thereby incorporating them by reference.

I. LEGAL STANDARD

Federal Rule of Evidence 201(b) governs the taking of judicial notice in the motion-to-dismiss context. *See, e.g., Brown v. Google LLC*, 525 F. Supp. 3d 1049, 1061 (N.D. Cal. 2021) (granting a request for judicial notice in ruling on a motion to dismiss). Rule 201(b) permits judicial notice of facts “not subject to reasonable dispute.” Fed. R. Evid. 201(b). Facts are considered to be not subject to reasonable dispute when they (1) are “generally known within the trial court’s territorial jurisdiction” or (2) can be “accurately and readily determined from sources whose accuracy cannot be reasonably questioned.” *Id.*; *see also Minor v. FedEx Off.*, No. 14-CV-01117-LHK, 2014 WL 12570168, at *3–4 (N.D. Cal. Aug. 11, 2014) (reciting and applying these rules). It is well established that “court documents already in the public record and documents filed with other courts,” as well as “publicly accessible websites,” are “[p]roper subjects of judicial notice.” *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1241 (N.D. Cal. 2014) (citing

Holder v. Holder, 305 F.3d 854, 866 (9th Cir. 2002), and *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998–99 (9th Cir. 2010)).

The doctrine of incorporation by reference, which is distinct from the doctrine of judicial notice, supplies an additional basis for considering documents beyond a complaint’s four corners in the specific context of a Rule 12 motion. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018) (“Unlike rule-established judicial notice, incorporation-by-reference is a judicially created doctrine that treats certain documents as though they are part of the complaint itself.”). When a plaintiff’s claim depends on the contents of a document attached to the defendant’s motion to dismiss, and the document’s authenticity is unquestioned, the court may deem the document “incorporated” into the complaint. *Knieval v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005); *accord United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (stating that a document “may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff’s claim”). In deciding a motion to dismiss, a court “must consider the complaint in its entirety,” including “matters of which a court may take judicial notice” and “documents incorporated into the complaint by reference.” *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007); *Khoja*, 899 F.3d at 999.

II. ARGUMENT

A. Judicial Notice

Exhibits 1–21 are judicially noticeable as publicly available web pages and are not subject to reasonable dispute. *See* Fed. R. Evid. 201(b); *Hammerling v. Google LLC*, No. 21-CV-09004-CRB, 2022 WL 17365255, at *4 (N.D. Cal. Dec. 1, 2022) (“webpages . . . are regularly the subject of judicial notice in this circuit”); *Caldwell v. Caldwell*, No. C 05-4166 PJH, 2006 WL 618511, at *4 (N.D. Cal. Mar. 13, 2006), *order clarified*, No. C 05-4166 PJH, 2006 WL 734405 (N.D. Cal. Mar. 20, 2006) (“The court agrees with the proposition that, as a general matter, websites and their contents may be proper subjects for judicial notice.”).

Exhibits 1-5 consist of Google’s publicly available terms of service and policies governing the use of Google products for analytics and online advertising. Exhibit 3 is Google’s publicly

available privacy policy.¹ Exhibits 6–21 are publicly available privacy policies, cookie policies, terms of service, and home pages for healthcare providers, hospital networks, and clinic operators identified in Plaintiffs’ Amended Complaint. *See* FAC ¶¶ 19–31.

“These documents appear on publicly available websites and are thus proper subjects for judicial notice.” *Brown*, 525 F. Supp. 3d at 1061. Courts in this District often take judicial notice of publicly available privacy policies and terms of service in privacy-related litigation (including many of the very same documents Google asks the Court to notice here). *See, e.g., Matera v. Google Inc.*, No. 15-CV-04062-LHK, 2016 WL 5339806, at *7 (N.D. Cal. Sept. 23, 2016) (noticing Google’s terms of service and privacy policies); *In re Google Inc.*, No. 13-MD-02430-LHK, 2013 WL 5423918, at *7 (N.D. Cal. Sept. 26, 2013) (same); *Calhoun v. Google*, 526 F. Supp. 3d 605, 617–18 (N.D. Cal. 2021) (same); *Brown*, 525 F. Supp. 3d at 1061 (same); *In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016, 1025 (N.D. Cal. 2014) (same for Yahoo’s); *Yuksel v. Twitter, Inc.*, No. 22-CV-05415-TSH, 2022 WL 16748612, at *2 (N.D. Cal. Nov. 7, 2022) (same for Twitter’s terms of service and rules); *Coffee v. Google LLC*, No. 20-CV-03901-BLF, 2021 WL 493387, at *3–4 (N.D. Cal. Feb. 10, 2021) (same for Google’s terms of service); *In re Fibrogen, Inc.*, No. 21-CV-02623-EMC, 2022 WL 2793032, at *6 (N.D. Cal. July 15, 2022) (noticing “publicly available press releases” by nonparties); *Bos. Ret. Sys. v. Uber Techs.*, No. 19-CV-06361-RS, 2020 WL 4569846, at *3 (N.D. Cal. Aug. 7, 2020) (noticing 26 news articles in a securities class action to show “that particular information was available to the stock market”).

B. Incorporation by Reference

In deciding Google’s Motion to Dismiss, the Court also may consider the materials in Exhibits 1-3 and 5 for the additional reason that Plaintiffs’ Amended Complaint incorporates them by reference. Where, as here, important documents are “referenced in a complaint but not

¹ For information about the scope of Google’s Privacy Policy, see Google, *About this policy*, Privacy Policy, <https://policies.google.com/privacy?hl=en-US#about> (last visited July 21, 2023).

explicitly incorporated therein,” “the complaint relies on the document[s],” and their “authenticity is unquestioned,” a court may consider them when deciding a motion to dismiss. *Id.* This serves to “[p]revent [] plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting . . . documents upon which their claims are based.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (internal quotations and citation omitted).

Exhibits 1-3 and 5 are Google’s privacy policies and terms of service that are referenced and relied on by the Complaint’s allegations regarding Google’s cookie-related policies and conduct. *See* FAC ¶¶ 515 (alleging that Google has violated its “own policies, including but not limited to. . .Google’s Terms of Service and Google’s Privacy Policy,” attached hereto as Exhibits 3 and 5); FAC ¶¶ 303, 410 (referencing the document attached hereto as Exhibit 2). Exhibit 1 is the Google Analytics Terms of Service, which is referenced in the Complaint. FAC ¶ 331 (quoting the Google Analytics Terms of Service).

Similarly, the Amended Complaint’s allegations that Google violated Plaintiffs’ “reasonable expectations” of privacy while using healthcare-related websites reference and rely on those websites’ privacy policies, cookie policies, terms of service, and homepages, attached hereto as Exhibits 6-21. *See* FAC ¶¶ 20–31 (repeatedly alleging that Plaintiffs had a “reasonable expectation that Google would not track, collect, or monetize [] Health Information” in connection with their use of the sites whose policies are contained in Exhibits 6-21).

All of these documents are “integral to the . . . complaint” because it references and relies on them for its allegations. *See Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) (capitalization altered). Accordingly, Plaintiffs’ Amended Complaint incorporates these documents by reference, and the Court may consider them in deciding Google’s Motion to Dismiss.

III. CONCLUSION

For the foregoing reasons, Google respectfully requests that the Court consider Exhibits 1–21 under the doctrines of judicial notice and/or incorporation by reference, as appropriate, in connection with Google’s concurrently filed Motion to Dismiss.

Dated: December 21, 2023

WILLKIE FARR & GALLAGHER LLP

By: /s/ *Benedict Hur*

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